FILE COPY

IN THE

Supreme Court of the United States

No. 681 October Term, 1947

THOMAS VIOLA,

Petitioner

vs.

THE STATE OF OHIO,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO, BRIEF IN SUPPORT OF PETITION, APPENDIX

and

MOTION TO DISPENSE WITH PRINTING OF RECORD

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IN THE
SUPREME COURT OF THE UNITED STATES

No. October Term, 1947

Thomas Viola,
Petitioner

vs.

The State of Ohio,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

To the Honorable, Fred M. Vinson, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Thomas Viola, Petitioner, respectfully prays that a writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Ohio entered in the above cause on November 19, 1947, affirming the judgment of the Court of Appeals for the 7th Judicial District of the State of Ohio, convicting him of murder in the first degree, with recommendation of life imprisonment.

1. The Record was not printed in the Court Below and Motion is duly filed in this Court to dispense with the printing of the Record on Petition for Certiorari. This Motion is printed as an addendum to this Petition and Brief. References to the original Record bear the designation "R".

OPINIONS BELOW

The Trial Court, the Court of Common Pleas of Trumbull County, Ohio, issued no opinion in this case. The opinion of the Court of Appeals for the 7th Judicial District, Ohio, has not been reported. The decision, without opinion, of the Court Below, the Supreme Court of the State of Ohio, in affirming the judgment of conviction, and in denying defendant's (a) appeal as of right, and (b) motion for leave to appeal, is reported in 75 N. E. (2d) 715.

JURISDICTION

This cause was argued before the Supreme Court of Ohio on November 23, 1947. The opinion and judgment of that Court were entered on November 19, 1947. On that date, the Ohio Supreme Court denied defendant's appeal as of right on the ground that no debatable constitutional questions were involved. On February 16, 1948, this Court, upon consideration of the application of counsel for petitioner, extended the time for filing petition for writ of certiorari in this case to and including March 18, 1948.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; Title 28, U. S. C. A., Section 344. (See also Rule 38 of the Rules of the United States Supreme Court.)

The questions herein presented were raised in the Trial Court, in the Court of Appeals and in the Supreme Court of Ohio.

SUMMARY STATEMENT OF THE FACTS AND OF THE MATTER INVOLVED

Your petitioner was indicted by the Grand Jury of Trumbull County, State of Ohio on February 14, 1944, charged with the crime of murder in the first degree of one James Mancini on March 24, 1941, upon an indictment based on Ohio General Code, Section 12400, and, after his arrest at Tucson, Arizona in August 1945, was held without bail thereon. To this indictment your petitioner pleaded that he was not guilty.

The case was tried before J. H. Birrell, Judge, and a jury in the Court of Common Pleas of Trumbull County, Ohio. The trial commenced on March 25, 1946, and continued until April 8, 1946. The jury returned a verdict of guilty of murder in the first degree, with a recommendation of mercy. A Motion for New Trial was duly filed in the Trial Court on April 9, 1946 and overruled on April 12, 1946, at which time the defendant was sentenced to the Ohio State penitentiary for life (R. 1514).

An appeal from the said conviction, judgment and sentence was taken to the Court of Appeals, 7th District, Ohio, under the provisions of Ohio General Code, Section 13459-1. On June 6, 1947, the judgment of the Court of Common Pleas was affirmed, many months after the appeal was taken.

An appeal to the Supreme Court of Ohio from the affirmance by the Court of Appeals of said conviction,

judgment and sentence was taken under the provisions of Ohio General Code, Sections 13459-1 and 7. This appeal was filed both as a matter of right, since debatable constitutional questions were involved, and on condition that motion for leave to appeal be granted by the Supreme Court. The Supreme Court, on November 19, 1947, dismissed and denied both requests, stating as to the appeal filed as of right that no debatable constitutional questions were involved. The judgment of the Ohio Supreme Court constitutes a final judgment by the highest court of that State. (*Tumey v. State of Ohio*, 273 U. S. 510, 515; *Hetrick v. Lindsey* (Ohio) 265 U. S. 384).

STATEMENT OF FACTS

About 9:30 o'clock on the night of March 24, 1941, two strangers entered the barroom of the Prime Steak House, situated in Warren, Ohio, walked to the bar, ordered drinks, shot and killed James Mancini, the proprietor, and his nephew, Felix Monfrino, and escaped. Mancini had for many years been engaged in various liquor, gambling and entertainment enterprises in and about Warren, Trumbull County, Ohio (R. 218-222), and had been known as the "boss of the rackets" in Warren (R. 224). The nephew had been associated with his uncle in these enterprises.

Although there were about ten persons in the Steak House barroom (R. 99) at that time, none of them recognized either of the two strangers. The Warren police took a number of the eye witnesses to Pittsburgh and Cleveland for the purpose of identifying the strangers from the Rogues' Gallery of the police departments of those cities. Thereafter, Monfrino's father, and Tony Shiro, known as "Tony the Hawk" or "Tony the Killer", accompanied by Sergeant Johnson of the Warren Police made numerous trips to various cities, San Francisco, Miami, etc., for the purpose of identifying the murderers (R. 157). On two occasions, once at a prize fight at Pittsburgh, and once at a police lineup at Pittsburgh, certain men were mistakenly identified.

Not until December, 1943, did the Warren police have any intimation as to the alleged identity of the strangers. About January 2, 1944, Sergeant Johnson received infor-

mation through an oral tip concerning suspects in connection with these murders (R. 572-575, 599). He was informed that one Charles Monazum and Thomas Viola, your petitioner, were alleged to be involved therein. Monazum was at that time, and is at present, serving a sentence for bank robbery at the Federal Prison at Leavenworth, Kansas. Of the ten eye witnesses at the barroom on March 24, 1941, only three identified pictures shown to them by Sergeant Johnson as that of your petitioner and of Monazum. These included Tony Shiro, an employee and bodyguard of the deceased, Bernard Monfrino, father of one of the victims, and Nofrey Mancini, son of the deceased (R. 72, 73, 261-302). Dicenzo (R. 894-895), Cage (R. 924-925), Harris (R. 1062-1063) and Chalupaka (R. 1133-1135), four of the other eye witnesses to whom the pictures were shown, stated that none of the pictures was that of either of the two strangers involved in the murders.

On August 8, 1945, your petitioner was arrested by the F. B. I. at the Santa Rita Hotel at Tucson, Arizona, on a federal warrant, charging unlawful flight to avoid prosecution. Your petitioner, who had been a patient at a Detroit hospital in December of 1943 and January of 1944, had been instructed by his physician to go to Arizona for his health. The hospital's records confirmed this reason for Petitioner's presence in Tucson.

There was dispute among the witnesses at the trial as to the identification of the witnesses. Three witnesses, Bernard Monfrino, Nofrey Mancini and Tony Shiro identified Viola as the shorter of the two strangers. Dicenzo, Cage and Harris, disinterested witnesses, stated positively that your petitioner was not one of the two strangers at

the Steak House on March 24, 1941—five years before the trial. The other witnesses, Showacre, Mrs. Hernon, Mock and Chalupka stated they were not able to identify the defendant as one of the strangers involved in the murders.

The only other means of identification of your petitioner as one of the strangers was the testimony of Latona, an F. B. I. finger print expert, who testified that a fragment of the left index finger found on one of the whiskey glasses used by one of the strangers was that of the defendant. Although the glasses and the photographic enlargement of the finger print had been sent to the F. B. I. finger print offices on April 4, 1941, no identification had been made at that time. The letter of transmittal which accompanied the glass to the F. B. I. office at Washington on April 4, 1941, referred to "the Old Man" and to "Buffalo Joe", neither of whom was Viola or Monazum, as suspects in these killings (Ex. 4).

George A. Lacy, identification expert on finger prints of Houston, Texas, called as a witness in defense, refuted Latona's identification and was of the opinion that there were not sufficient points of similarity on the shot glasses and whiskey glasses alleged to have been handled by one of the strangers to make a comparison between them and the admitted ink prints of petitioner (R. 1315).

Admission of State's Ex. "U", a letter from J. Edgar Hoover of the F. B. I. dated February 5, 1944, *identifying latent and ink finger prints, deprived defendant of an opportunity to be heard in his defense and to be confronted with and to cross examine witnesses, and of his liberty without due process of law* in violation of the 14th Amendment: Over defendant's repeated objections, the Trial Court ad-

mitted into evidence State's Ex. "U", a letter dated February 5, 1944, from J. Edgar Hoover, chief of the F. B. I., wherein he stated that the latent and ink finger prints were identical (R. 802-803). Mr. Hoover was not a witness at the trial. This objection was renewed in the briefs and at the oral arguments before the Court of Appeals and the Supreme Court of Ohio, on the ground that the admission was in clear violation of defendant's rights under the Constitutions of both the United States and the State of Ohio, and deprived him of his liberty without due process of law by not giving him full opportunity to be heard in his defense.

The giving of additional instructions to the jury in the absence of the accused in violation of his constitutional right under the 14th Amendment to be present at all times during the trial: During their deliberation the jury sent written questions to the Judge. These were: (1) Is the State's Ex. "A-6" (photographic enlargements of the latent and ink prints) evidence or comparison; (2) Should we have evidence at Coroner's inquest? (R. 1466). During Petitioner's enforced absence, by agreement the answer to the second question was: "No" (R. 1465). The Court stated that the answer to the first question was that State's Ex. "A-6" is evidence. However, the Court refused to add to the second answer the following instruction requested by the defense counsel: "And the jury may compare the prints for identification if it so desires" (R. 1465).

The Court stenographer was not present when the jury asked for these additional instructions. Defense counsel agreed that the answers to the questions as delivered by the Court might be written out and sent to the jury in their jury room (R. 1466). The Court, thereafter, considered the

possibility of defense counsel's not having the power to waive defendant's right to be present at the giving of the answers to the questions. The jury was recalled to the jury box and instructed as to the answers to the questions in the presence of the defendant (R. 1467). Within a very short time, the jury returned with its verdict, thus proving that the additional instruction given on this point materially affected the jury's verdict of conviction. The giving of the additional instructions on the first occasion, in the absence of the accused is assigned hereinafter as fundamental and prejudicial error—in violation of defendant's constitutional right to be present at all times during the trial.

Nowhere in the transcript of testimony is there any evidence that defendant had ever been in Warren, Ohio, or that he was acquainted with James Mancini or Felix Monfrino or with any of the witnesses to the homicide, or that he knew Monazum, the other alleged stranger. The only time he was alleged to have been in Warren was on the night of March 24, 1941. No witness testified that he had ever seen Viola in Warren on the night of the killings or prior thereto or subsequent thereto. His alleged presence in Warren was unexplained. The State failed to show any motive on the part of Petitioner for the murders.

QUESTIONS PRESENTED

1. Whether the conviction, which rested principally on the admission of State's Exhibit "U", the letter of J. Edgar Hoover, identifying the latent print on the glasses handled by one of the strangers with that of Petitioner's admitted finger print, is consistent with the due process of law required by the 14th Amendment to the Constitution of the United States. Defendant was not confronted by Mr. Hoover and given an opportunity to be confronted with or to cross examine Mr. Hoover as to the basis for his opinion as to identity. Such procedure deprived your petitioner of an opportunity to be heard in his defense.

2. Whether the giving of additional instructions to the jury in the defendant's absence — although waived by defendant's counsel and thereafter repeated in the presence of the defendant, but not in any manner waived by defendant himself—was consistent with the due process of law required by the 14th Amendment to the Constitution of the United States, especially where the law of the State of Ohio specifically provides that such presence at all stages of the trial cannot be waived.

REASONS FOR ALLOWANCE OF WRIT

1. The admission of State's Ex. "U", the letter from Mr. Hoover, identifying the latent and ink prints, deprived your petitioner of an opportunity to be heard in his defense: to confront and cross-examine Mr. Hoover. The privilege of confrontation and cross-examination is an essential condition of due process under the 14th Amendment to the Federal Constitution, especially where the privilege has long been established by local practice. The admission of this hearsay evidence was so radical and unjust as to work a destruction of fundamental rights and thus a denial of due process.

2. The admission of State's Ex. "U", the letter from Mr. Hoover, identifying the latent and ink finger prints as identical was in clear violation of your petitioner's rights under Section 10, Article I of the Constitution of Ohio and in violation of the 14th Amendment to the United States Constitution and amounted to a *conviction by correspondence.* The right to have opportunity to be heard in defense—especially the right to be confronted with and cross-examine witnesses—is "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

3. The giving of the additional instructions by the Trial Court in the enforced absence of the defendant was a denial of the right of your petitioner to be present at all stages of the trial, as prescribed in Section 10, Article I of

the Constitution of said State, and Section 13442-10, Ohio General Code, and in violation of Article 14 of the Amendments to the Constitution of the United States.

4. The giving of the additional instructions in the absence of defendants deprived your petitioner of the privilege under the 14th Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. The defense would be made easier if the accused had been permitted to be present at the time of giving additional instructions for it would have been in his power if possible to give advice or suggestions or even to supersede his lawyers altogether and to conduct the trial himself:

Snyder v. Commonwealth of Massachusetts, 291 U. S., 97, 54 S. Ct. Rep. 330;

Lewis v. United States, 146 U.S. 370, 13 S. Ct. Rep. 136, 36 L. Ed. 1011.

5. The giving of the additional instructions, in the absence of the defendant, in the light of the long established practice in the Courts of the State of Ohio and in the highest courts of a majority of the States, recognized by Justices of the highest learning and especially acknowledging the right under the law of defendants in capital cases to be personally present at all stages of the trial, was a violation of Sec. 10, Article I of the Ohio Constitution and Sec. 13442-10, Ohio General Code and a violation of Article 14 of the Amendments to the Constitution of the United States. Such trial procedure could not be waived by the accused's counsel, or cured by the repetition of the additional instructions in his presence: see *State v. Grisafulli,* 135 O.S. 87, 19 N.E. (2d) 645.

6. The precise Federal questions of substance herein raised have not been heretofore determined by this Court. These are important questions of Federal law which should be settled by this Court. The questions go to the very essence of a criminal trial and the resolution thereof will vitally affect the administration of justice in criminal cases throughout the Nation.

PRAYER FOR WRIT OF CERTIORARI

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Supreme Court of the State of Ohio to the end that the constitutional questions and issues herein involved may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that the judgment herein of said Supreme Court of Ohio be reversed by this Court and for such further relief as to this Court may seem meet and proper.

Respectfully submitted,

CHARLES J. MARGIOTTI,

Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. OPINIONS OF COURTS BELOW

The opinion of the Court of Appeals for the 7th Judicial District of the State of Ohio has not been reported. The decision, without Opinion, of the Supreme Court of the State of Ohio, is reported in 76 N. E. (2d) 715.

II. JURISDICTION

1. The date of the final judgment to be reviewed is November 19, 1947. On February 16, 1948, upon consideration of the application of counsel for petitioner, this Court extended the time for filing Petition for Writ of Certiorari in this cause to and including March 18, 1948.

2. The statutory provision which is invoked to sustain the jurisdiction of this Court is Section 237b of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 937 (28 U.S.C.A., Section 344).

3. The constitutional question (a) as to the admission of State's Ex. "U", a letter dated February 5, 1944, from J. Edgar Hoover, Chief of the F. B. I. stating that the latent prints on the glasses handled by one of the strangers and the admitted ink print of your petitioner were identical; and (b) the giving of the additional instructions in the absence of the defendant were raised at the trial and before the Court of Appeals and the Supreme Court of the State of Ohio as involving violations of petitioner's rights under the federal Constitution, 14th Amendment. A letter from the Clerk of the Supreme Court of the State of Ohio, in response to a petition for a certificate of that Court, clarifying its opinion so as to show that the constitutional questions were raised under the United States Constitution, has been deposited with the Clerk of this Court and is attached as an appendix to this Petition for Certiorari.

Jurisdiction

4. The petition is for review of a cause wherein final judgment has been rendered or passed upon by the highest court of a state in which a decision could be had, in which petitioner specifically set up and claimed a right under the Constitution of the United States.

III. STATEMENT OF THE CASE

This has already been stated in the preceding petition (pages 4-10), which is hereby adopted and made a part of this Brief.

IV. SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of the State of Ohio erred:

1. In denying your petitioner's appeal as of right on the ground that no debatable federal constitutional questions were involved.

2. In failing to hold that the admission of State's Ex. "U", the letter from Mr. Hoover, identifying the latent print on the whiskey glass handled by one of the strangers, and the admitted ink print of your petitioner, without Mr. Hoover's appearance as a witness, was in violation of your petitioner's rights under the 14th Amendment to the United States Constitution, and that such admission, by depriving defendant of the right to confront and cross-examine the writer of said letter, deprived him of an opportunity to be heard in his defense and of liberty without due process of law.

3. In failing to hold that the giving of additional instructions in the absence of your petitioner, although waived by counsel and thereafter repeated in the presence of the defendant, deprived him of his privilege under the 14th Amendment to the United States Constitution to be present at all stages of a trial in a capital case.

4. In affirming the judgment of the Court of Appeals for the 7th Judicial District of Ohio.

V. ARGUMENT

Point I

Due Process of Law under the 14th Amendment Required the Exclusion of State's Ex. "U", a Letter Wherein J. Edgar Hoover, F.B.I. Chief, Identified the Latent Print on the Glasses Handled by One of the Strangers, and the Admitted Ink Print of the Defendant, Because its Admission, Depriving Defendant of the Right to Confront and Cross-examine a Witness Against Him, Was in Violation of His Privilege to Be Given an Opportunity to Be Heard in His Defense.

The admission of State's Exhibit "U", letter dated February 5, 1944, from Mr. Hoover wherein he stated that the latent and ink finger prints were identical, without his appearance as a witness, was in clear violation of the petitioner's rights under the Constitutions of both the United States (14th Amendment) and of the State of Ohio.

The Constitution of the State of Ohio, Article I, Section 10 Trial for Crimes; Witness:

> "* * * In any trial, in any court, the party accused shall be allowed to appear and defend *in person* and with counsel; * * * *to meet the witness face to face* * * * but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance cannot be had at the trial, always

securing to the accused means opportunity *to be present in person* and with counsel at the taking of such deposition, and *to examine the witness face to face* as fully and in the same manner as if in court * * * "

In 12 O. Jur.—Criminal Law—Section 121, the rule excluding testimony of the foregoing nature is thus stated (Pa. 158-159):

"It is a fundamental principle in criminal prosecutions that the accused has the right to meet the witnesses against him face to face. The Constitution of Ohio (Art. I, Sec. 10) guarantees the accused this right in any trial in any court. * * * It has been said that this right is a Constitutional guarantee of a fundamental principle which was well established and long recognized at common law. * * *

In addition to meeting witnesses face to face, the accused has the right to test the qualifications of a witness before he testifies when his competency as a witness is questioned in good faith * * *."

It is fundamental law that the accused person has the right to test the recollection or to search the conscience of a witness, or to compel him to stand face to face with the jury in order that they may observe his expression and demeanor and the manner in which he gives his testimony, and, therefore, to judge his credibility. To permit the present conviction to stand upon evidence such as Exhibit "U" would be tantamount to a *conviction by correspondence*. Justice would not be dispensed by the courts, where all the State would have to do would be to introduce a letter from any person stating that the defendant was guilty of the crime for which he was charged. No reflection

is intended to be cast upon Mr. Hoover, because his experience, ability and reputation are undisputed. But we do not think that even Mr. Hoover intended that the accused should be convicted on the strength of his letter.

The incompetency of this Exhibit "U" was recognized by the Trial Court (R. 802). This incompetency was not cured by reason of the defense counsel having asked questions concerning it during cross-examination. In attempting to secure all the information pertaining to the identification of the prints, counsel was acting within the scope of his duty to uncover as much information as he could in defense of the accused. The cross-examination moreover was centered not around the contents of either Exhibits "U", but around the circumstances under which this letter was dictated. It was ascertained that this letter was dictated by Mr. Noles, and that Mr. Hoover merely signed his signature thereto (R. 702).

There is no doubt that State's Exhibit "U" was the pivotal point of this case. It is only logical to presume that the jurors read into each statement of Latona the fact that it was supported, in all fours, by independent investigation and approved by Mr. Hoover.

The inadmissibility of Exhibit "U" is further seen in the fact that the statement of Mr. Hoover was not based upon any personal examination of the prints by himself, but rather upon the examination and comparison by Mr. Noles (R. 702). Thus, even if Mr. Hoover had been present at the trial of this case and had testified, in substance, to the contents of Exhibit "U", and had admitted that he had not made the examination and comparison himself, his testimony would have been incompetent because

of his lack of personal knowledge of the contents. It was most arbitrary upon the part of the Trial Court to admit his written statement into evidence and to afford to it the weight it carried in the minds of the jurors.

The rule cited by the Court of Appeals in justification of its overruling of this Assignment of Error is not applicable. The Court cited 17 O. Jur., Section 493, p. 600, in justification of its finding. An examination of the rule as therein stated shows that the opposing party is entitled to introduce the entire document only "where the reading of the entire document is necessary to ascertain with certainty its real sense and meaning". No such necessity is seen in this case.

Both the Court of Appeals of Ohio and the State Supreme Court acted under the misapprehension that petitioner's counsel had requested the admission of Exhibit "U" into evidence. The Court of Appeals observed "that in granting his request the trial judge said in substance that since both parties desired its admission in evidence, he would admit such Exhibit, and that Mr. Margiotti then said 'then that is all right as long as we can agree' " (Opinion of the Court of Appeals, page 10).

An examination of the transcript of the testimony in the record certified to this Court will show that petitioner's counsel specifically objected to the admission of State's Exhibit "U" (R. 802), and that his statement as to the admission of an exhibit—"then that is all right as long as we can agree"—was made with reference to State's Exhibit "R", at an earlier stage of the trial, and at a time when State's Exhibit "U" had not yet even been identified (R. 567). State's Exhibit "R" was a letter

from the F. B. I. to the Warren Police, dated April 10, 1941. It first appears in the Record at page 557. Questions with reference to State's Exhibit "R" appear at pages 567 to 570. Petitioner's counsel had originally asked that this letter be admitted into evidence (R. 567) The Court stated that since both sides wanted the letter (Ex. "R") introduced, it would admit the letter (R. 569). It was only with reference to State's Exhibit "R"—and not to State's Exhibit "U", the Exhibit involved in this case—that petitioner's counsel stated, "then that is all right as long as we can agree".

State's Exhibit "U" was first identified at page 593, long after the discussion as to the admissibility as to State's Exhibit "R" had taken place. At page 802, when State's Exhibit "U" was offered in evidence, petitioner's counsel emphatically objected to its admission.

Thus it is readily seen that both the Court of Appeals and the Ohio Supreme Court confused the objections of petitioner's counsel to Exhibits "R" and "U". At no time did petitioner's counsel request the admission of Exhibit "U" into evidence. At no time did petitioner's counsel state to the trial court that he desired the admission of State's Exhibit "U" into evidence. When the Court admitted Exhibit "R" into evidence (R. 570), Mr. Margiotti said, "then that is all right as long as we can agree" solely with reference to Exhibit "R" and not to Exhibit "U". Thus it is submitted that there was no acquiescence on the part of petitioner's counsel in the admission of Exhibit "U".

Thus, in conclusion, it is seen that the State's Exhibit "U" was originally incompetent and prejudicial. Its

appearance for the first time during the cross-examination of the State's witnesses for a limited purpose—the ascertainment of the circumstances under which it was executed—did not cure or render admissible said incompetent Exhibit. The extent to which they prejudiced the accused in the minds of the jurors cannot be computed. Most certainly, the jurors did not believe they were in the position to dispute an absolute and affirmed statement by the Director of the Federal Bureau of Investigation, that the latent print on the glasses and the ink print on the F. B. I. finger print cards were identical. Additional objection to the admission of Exhibit "U" is the fact that therein Mr. Hoover stated, as an ultimate fact, that the finger prints were identical. He stated that " * * * You are advised that, upon comparison, the unidentified latent finger print in this case has been identified with the left index finger impression of Thomas Viola" (1492).

It is submitted, therefore, that the admission of Exhibit "U" resulted in the *conviction of* the accused not based upon competent, relevant and material testimony, but based *upon correspondence*, upon a letter, from Director J. Edgar Hoover to Chief of Police Gillen of the Warren Police Department. The admission of said Exhibit "U" deprived the defendant of a fair trial and of his liberty without due process of law—which he was guaranteed by the Constitution of the United States and of the State of Ohio.

The State of Ohio is free to regulate the procedure of its courts "in accordance with its own conceptions of policy and fairness, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

"The due process clause of the Fourteenth Amendment requires that action by a state or through any of its agencies, must be consistent with the fundamental principles of liberty and justice which lie at the basis of our civil and political institutions, which are not infrequently designated as the 'law of the land'" (63 S. Ct. 1129, at 1130).

Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674;

Twining v. New Jersey, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed., 97;

Maxwell v. Dow, 176 U.S. 581, 20 S. Ct. 448, 44 L. Ed, 597;

Hurtado v. California, 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed., 232;

Frank v. Mangum, (Ga.) (1915), 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed., 969;

Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158;

Lisenba v. California, 314 U.S. 219, 62 S. Ct. 280, 86 L. Ed., . . . ;

Chambers v. Florida, 309 U.S. 227, 60 S. Ct. 472, 84 L. Ed., 716;

Herbert v. Louis, 272 U.S. 312, 316, 47 S. Ct. 103, 104, 71 L. Ed., 270;

Buchalter v. New York, 319 U.S. 427, 63 S. Ct. 1129, 87 L. Ed., 1492;

Lyons v. Oklahoma, 322 U.S. 596, 64 S. Ct. 1208, 88 L. Ed., 1481.

Hysler v. Florida, 315 U.S. 411, 62 S. Ct. 688, 86 L. Ed. 932;

Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed., 682;

Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149;

Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 899;

Malinski v. New York, 324 U.S. 401, 65 S. Ct. 781.

Although it is admitted that the State's procedure does not run foul of the 14th Amendment because another method may seem to our thinking to be fairer or wiser, or to give a surer promise of protection to the prisoner at the bar (i.e. consistent with that Amendment, trial by jury may be abolished; indictments by a grand jury may give way to informations by a public officer; the privilege against self-incrimination may be withdrawn and the accused put on the stand as a witness for the State) nevertheless, what may not be taken away is notice of the charge and an *adequate opportunity to be heard in defense of it.* This error was such as to deprive petitioner of a trial according to the accepted course of legal proceedings. *See Twining v. New Jersey, supra, Powell v. Alabama, supra,* pages 68, 71 of 287 U.S. 53.

In *Snyder v. Massachusetts, supra,* 291 U.S. 97, at page 106 Mr. Justice Cardozo stated:

> "* * *Thus, the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the Federal courts (Gaines v. Washington, supra at

page 85 of 277 U.S., 48 S. Ct. 468, 72 L. Ed. 793) and in prosecutions in the state courts is assured very often by the Constitutions of the states. For present purposes we assume that the privilege is enforced by the 14th Amendment, though this has not been squarely held" (citing cases).

It is admitted that erroneous rulings on evidence by a state court do not constitute a denial of due process. However, in this case the admission of the hearsay letter of Mr. Hoover, without his having been called as a witness against the accused, deprived him of an opportunity to confront the witness to cross-examine him, to be heard in his own defense and thereby deprived him of his liberty without due process of law. The right to a fair trial is protected by the 14th Amendment. *Adamson v. California,* 332 U.S. 46, 67 S. Ct. 1672.

The prosecution's contention that the defense counsel's action—in having inquired as to the correspondence between the F. B. I. and the Warren police, in having been given State's Exhibit "U" together with other letters, and in having made inquiries concerning the authentication of the glasses,—rendered such letter admissible in evidence, proceeds upon a misconception of the nature of petitioner's complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void. They were void for want of essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. It was challenged before the Trial Court, the Court of Appeals and the Supreme Court of the State by the invocation of the 14th Amendment. The

Supreme Court of Ohio refused to entertain the challenge, stating that no debatable constitutional questions were involved, and thus declined to enforce petitioner's constitutional rights. The Court thus denied a Federal right fully established and specially set up and claimed, and therefore for this reason alone the judgment must be reviewed.

The mere fact that questions were asked concerning the aforesaid correspondence did not constitute a waiver of the initial incompetency and the inadmissibility of said letter. In *Brown v. Mississippi,* 297 U.S. 278, it was held that the failure of counsel for defendant, who had objected to the admissibility of confessions, to move for their exclusion after they had been introduced and after a fact of coercion in obtaining the confessions had been proved, did not preclude reliance on the erroneous admission of the confession to obtain reversal since the conviction and sentence were void for want of essential elements of due process.

Although it is admitted that the 14th Amendment is not to be taken as embodying the provisions of the 5th and 6th Amendments, and that there is no general rule that whatever would be a violation of the original bill of rights (Amendments 1 to 8) if done by the Federal Government is now equally unlawful by force of the 14th Amendment if done by a state, nevertheless *certain privileges and immunities* which are valid as against the Federal Government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the 14th Amendment, became valid as against the states: See *Palko v. Connecticut,* 302 U.S. 319, at page 326.

In *Twining v. New Jersey*, 211 U. S. 78 at page 99, 29 S. Ct. 14, 19, 63 L. Ed. 97, this Court stated:

> "It is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because denial of them would be a denial of due process of law. Chicago, Burlington & Quincy Railroad Company v. Chicago, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law."

The fundamental basis to the conception of due process is that the hearing must be a real one, not a sham or pretense. *If a conviction is permitted to stand on the strength of a letter from a man of Mr. Hoover's reputation, integrity and standing, then the protection of the 14th Amendment's due process clause is meaningless.* The opportunity to be confronted with the author of this letter, to cross-examine him, and through such cross-examination to be given an opportunity to be heard in his own defense, was essential to the substance of a fair hearing. This is one of the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the 14th Amendment by a process of absorption. Although the right to confront witnesses and cross-examine them was in its origin effective under the 6th Amendment against the Federal Government alone the 14th Amendment has absorbed them. The process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. (See Warren,

the New Liberty under the 14th Amendment, 39 Harvard Law Review 43). In *Betts v. Brady,* 316 U.S. 455, it was held that the 6th Amendment of the National Constitution applies only to trials in Federal Courts; and that the due process clause of the 14th Amendment does not incorporate as such the specific guarantees found in the 6th Amendment. However, this Court there stated that a denial by a state of rights or privileges specifically embodied in the 6th Amendment and others of the first eight Amendments may, in certain circumstances, or in connection with other elements operate, in a given case, to deprive a litigant of due process of law in violation of the 14th Amendment.

The following language of Mr. Justice Roberts, at 316 U.S. 462 is pertinent:

> "Its application (14th Amendment) is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed."

The criminal proceedings which resulted in petitioner's conviction deprived him of the due process of law by which he was constitutionally entitled to have his guilt determined.

State's Exhibit "U", letter from Mr. Hoover, having been admitted as an Exhibit, was used by the prosecuting attorney during his oral argument to the jury. After his Charge, the Court permitted this letter to go out with the jurors and to be considered by them during their deliberations. The jurors, with this letter before them, must have read into the letter the magnificent performances by Mr. Hoover and the F. B. I. in criminal detection. World War II was still vivid in the minds of the jurors. Without doubt, the verdict must have been based principally on this ex parte statement rather than upon the oral testimony at the trial.

Therefore, it is submitted that the violation of the principles of the 6th Amendment as to confrontation of witnesses and cross-examination in this capital case, at least, is violative of the due process clause of the 14th Amendment. As stated by Rutlege, J., in *Application of Yamashita*, 327 U.S. 1, at page 44:

> "It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing a defense. * * * In capital and other serious offenses to convict on official documents and on hearsay, once or twice removed, more particularly when the documentary evidence or some of it is prepared ex parte by the prosecuting authority and includes not only opinions but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination.

Point II

Due Process of Law under the 14th Amendment Required the Presence of Petitioner When the Trial Court Gave Additional Instructions to the Jury.

The judicial Act of Judge Birrell at the trial in the Common Pleas Court in giving the additional instructions to the jury in the absence of the defendant, deprived petitioner of the protection of the 14th Amendment in that the presence of the defendant was necessary to the fundamental conception of due process of law:

Powell v. Alabama, 287 U.S. 45.

In *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, at 105, this Court ruled:

> "We assume in aid of the petitioner that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."

Certainly a defendant's personal presence in a capital case whenever any additional instructions are given has "a relation reasonably substantial to the fulness of his opportunity to defend against the charge." At that time it was in his power, if possible "to give advice or suggest or even to supersede his lawyers altogether and conduct the trial himself". The question of the weight to be given

to State's Exhibit "G" (the photographic enlargements of the latent and ink prints) was one of the pivotal points in this case. *The accused's presence at the time of the disposition of any issue thereon was as essential as his personal presence at the time of the reception of the evidence or at the time of the Court's Charge to the jury.*

It is recognized in *Snyder v. Massachusetts*, 291 U.S. 97, at 119 that cases relating to the procedure **at a view** are not to be confused with cases where the defendant was absent during the examination of witnesses or the Charge of the Judge.

The fundamental right in importance of personal presence of an accused at a criminal trial, particularly in capital cases, has been stressed by judicial expression whenever occasion has arisen. This court has said:

In *Lewis v. United States*, 146 U.S. 370, 372:

> "A leading principle that pervades the entire law of criminal proceedings is that after indictment is found, nothing shall be done in the absence of the prisoner."

And in *Hopt v. Utah*, 110 U.S. 574, 578, 579:

> "His (the prisoner's) life or liberty may depend upon the aid which by his personal presence, he may give to counsel and the court and triers. The necessity of the defense may not be made by the presence of his counsel only".

In *Schwab v. Bergren*, 143 U.S. 444, 448:

> "The personal presence of the accused from the beginning to the end of a trial for felony involving life

or liberty, as well as the time final judgment is rendered against him, may be and must be assumed to be vital to the proper conduct of his defense, and cannot be dispensed with".

This principle has its roots in the earlier history of the common law: See *Rex v. Ladsingham,* Sir T. Raymond Reports, 193 (1682).

In 1 *Cooley, Constitutional Limitations* (8th Edition), page 667, the authority states:

> "In cases of felony when the prisoner's life or liberty is in peril, he has the right to be present and must be present during the whole of the trial and until the final judgment."

See 1 *Bishop, New Crim. Proc.* (2nd Edition), Sec. 273.

In *French v. State,* 84 Wis. 400, 411, the Court said:

> "These great common law requirements have been made constitutional provisions in the various states, and so made essential and paramount, and also indispensable in trials for capital offenses and felonies. It is not too strict to hold that in all such cases the accused must be present in court to meet the witnesses face to face. * * * These are great constitutional safeguards against oppression and in justice they must not be abridged or compromised."

As stated in 23 *C.J.S.*—Criminal Law—Section 973—Presence of Accused, at pages 303-304:

> "In the absence of a permissible waiver, see Sec. 975a infra, under constitutional or statutory provisions

to that effect and at common law, an accused charged with a felony is entitled to be present, and, for a valid trial and conviction, must be present, at every stage of the trial, or at least when any important or substantive step is taken. While this rule is regarded in most jurisdictions as essentially for the benefit of accused, it has been held in other jurisdictions that *the rule is for the benefit of the state as well as accused,* and that accused's presence during the trial is essential to the jurisdiction of the court." (Italics ours)

In 23 *C.J.S.*—Criminal Law—Section 974—Particular Stages of Prosecution, instructions; communications with jury after retirement at page 306:

"Accused must be present during the argument and determination of the instructions to be given the jury. * * * A written instruction, after it has been delivered and the jury have retired, should not be corrected in the absence of accused. * * * Unless there has been a permissible waiver, accused must be present when the court charges the jury, or when, after their retirement, they are given additional instructions. * * * Accused must be present when there is any communication between the judge and the jury, after their retirement, and his absence at such time is ordinarily reversible error."

In 23 *C.J.S.*—Criminal Law—Section 975—Waiver at pages 309-310:

"In general, the right to be present during the trial of an indictment for felony cannot be waived by accused in a capital case."

At page 311 as to who may waive the right to be present:

> "Who may waive. It is generally held that a waiver of accused's right to be present during the trial, when permitted, must be made by him personally, and that the right cannot be waived by his counsel unless accused authorizes him so to do."

Accord: 14 Am. Jur.—Criminal Law—Sec. 189 and 190, at pages 899 to 900, the rule is thus stated:

> "In capital cases, and in fact in all charges of felony, whether the defendant is in custody or on bail, after indictment returned or information filed, nothing may be done by the court in the case unless the accused is personally present. In a capital case, the rule holds good even after the accused has pleaded guilty.
>
> The right to be present extends to every part of the trial proper. The defendant should be present on arraignment in felony cases, when evidence is given, when the jury is charged, when the court communicates with the jury in answering questions by them, when the jury receives further instructions, when the verdict is returned, and when evidence is introduced for the purpose of determining the amount of punishment to be imposed."

The following cases show that the personal presence of a defendant at all stages of a capital case is a necessary part of due process:

Sneed v. State, 5 Ark. 431, 41 Am. Dec. 102;

State v. Vanella, 40 Mont. 326, 106 P. 364, 20 Ann. Cas. 398;

State v. Kelly, 97 N.C. 404, 2 S.E. 185, 2 Am. St. Rep. 299;

State v. Jenkins, 84 N.C. 812, 37 Am. Rep. 643;

State v. Hensley, 75 Ohio St. 255, 79 N.E. 462, 9 L.R.A. (N.S.) 277, 116 Am. St. Rep. 734, 9 Ann. Cas. 108;

Com. v. Corsino, 261 Pa. 593, 104 A. 739, citing R. C. L.;

State v. Atkinson, 40 S.C. 363, 18 S.E. 1021, 42 Am. St. Rep. 877;

Stoddard v. State, 132 Wis. 520, 112 N.W. 453, 13 Ann. Cas. 1211.

In *Shields v. United States,* 273 U.S. 583, 47 S. Ct. 478 71 L. Ed. 787, it was held:

"It is reversible error for the trial judge in a criminal case to respond in writing, in the absence of the accused and his counsel, and without giving them an opportunity to be heard, to a written request by the jury for further instructions.

"A joint request by the prosecuting attorney and counsel for the accused made in the chambers of the judge without the presence of the accused, to hold the jury in deliberation until they should agree upon a verdict, does not justify communications by the court to the jury in the absence of the accused and his counsel, when the jury indicates a divergence of views with respect to the guilt of the several defendants."

Accord: *Diaz v. United States,* 223 U.S. 442, 32 S. Ct. 250 56 L. Ed. 500.

Argument

The accused has the right to be present when the Court charges the jury and this right extends to each and every instruction given the jury as to the law of the case: in 12 *O. Jur.*—Criminal Law—Section 115, page 50, it is stated:

> "* * * Where the jury on the trial of a felony have retired to consider their verdict, it is error for the Court, on the return of the jury into court, to again instruct them as to the law of the case in the absence of the accused, who was then in jail under Order of the Court, and such irregularity is not cured by the presence of the counsel of the accused at the time the additional instruction is given and his failure to make objection. If this right is denied the accused by reason of his imprisonment by Order of Court, it will be presumed that he was prejudiced thereby, and that without inquiry as to the correctness of instruction given in his absence."

It is submitted that the accused herein had a right to be present at all times during the course of the trial when anything was said or done affecting him, and that the giving of additional instructions in his absence was a violation of this right, affording a ground for new trial. The giving of these instructions in the absence of the defendant was a violation of his privilege to be present at every stage of the trial. The fact that jury was recalled and the additional instructions repeated in the presence of the accused does not cure the violation of his constitutional right to be present at all stages of the trial. It is presumed that he was prejudiced by the giving of the instructions on the first occasion in his absence. If such irregularity is not cured by the presence of the counsel of the accused at the time the

additional instructions are given and his failure to make an objection *(Kirk v. State,* 14 O. 511), it most certainly is not cured by repetition of the additional instructions in his presence.

Another objection to the giving of the additional instructions was the refusal of the Trial Judge to add to the answer of Request No. 1 that the jury "may compare the prints for identification if it so desires". The question submitted was "Is the State's Exhibit A-6 evidence or comparison?" The Court answered "No", and refused to add the requested additional instructions to the Answer. It is submitted that the Court committed fundamental error in refusing to permit the jury to make a comparison of the prints for identification if it so desired. After all, it is Hornbook law that the jurors are the final arbitrators of the facts, even though expert witnesses have testified one way or the other. By refusing to give additional instructions as requested by defense counsel, the Court again reinforced Latona's testimony and again gave it the effect of being an ultimate fact rather than merely an opinion. The jury was entitled to disregard the evidence of Mr. Latona in reaching its conclusion. They were not required to find in accordance with the opinion of this expert.

The Court of Appeals did not mention and apparently disregarded the leading case of *State v. Grisafulli,* 135 O.S. 87, 19 N.E. (2d) 645, in reaching its conclusion at page 31 of the Opinion by holding that:

> " * * * Under the law and the evidence in this case, defense counsel, by his action in consenting that the Trial Judge should send instructions to the jury in the first instance, and failing to object to his reinstructing

it in open court thereafter, waived any error that might have been committed in the first instance, and that no constitutional right of defendant was waived by any of the named acts of his counsel or omissions to act on their part. * * * We reached the conclusion that the interest of the defendant was not prejudicially affected by what the Court did during defendant's absence, as hereinbefore set forth herein. If the Trial Judge erred in refusing to properly instruct the jury, as defense counsel contends he did, it was their duty to object, which, as stated, they failed to do."

There is an unanimity of view among most jurisdictions in accord with the principal laid down in *State v. Grisafulli, supra:* See cases cited in 23 C. J. S. Criminal Law, Section 973, Presence of Accused at pages 303-304; Section 974, at page 306. Also: 14 Am. Jur. Criminal Law, Sections 189 and 190, at pages 899 to 900.

The right of personal presence comes within the pale of "an immutable principle of justice, which is the inalienable process of every citizen of a free government:"

Twining v. N. J., 211 U.S. 78, 113.

"* * * and which no member of the union may disregard"

Holden v. Hardy, 169 U.S. 366, 389.

The serious handicap of a prisoner charged with a capital offense in the conduct of his defense and in assisting counsel, by reason of the custody and restraint incident to a capital case has been judicially noticed in the leading case of *Diaz v. United States*, 223 U.S. 442, 455.

Argument

All the fundamental safeguards of the criminal law against oppression and justice rest upon broad grounds of fair play. They are not to be confused by technical interpretation or to be sacrificed or made to yield to mere temporary expediency or more expeditious processes of trying cases: *Tumey v. Ohio,* 273 U.S. 510; 47 S. Ct. 437.

Due process comprehends a fair and just hearing and a full and adequate opportunity for defense. Such protection to be more than meaningless pretense must assure an accused whose life is imperiled by judicial process to see through his own eyes, hear through his own ears and to act through his own powers of reasoning, not infrequently his best means of establishing innocence. No one can be substituted to exercise these faculties for him, against his will, when he chooses to personally exercise this acknowledged prerogative.

The mere repetition of the additional instructions in the defendant's presence did not cure the violation of his constitutional prerogative, as stated in *State v. Grisafulli,* page 648.

Under *State v. Grisafulli,* the initial giving of the additional instructions in defendant's absence, even though waived by his counsel, was presumed prejudicial and reversible error. The repetition thereafter in his presence did not cure the harm that had been caused originally. Where error occurred which, within the range of a reasonable possibility might have affected the verdict of a jury, defendant is not and should not be required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. So to hold would as a practical matter take from the defendant his right to a fair trial.

In this case we know nothing of what went on when the additional instructions were received and read in the jury room. It is entirely possible that the manner in which they were read was misinterpreted. Emphasis plays an important role in transmission of ideas by word of mouth. What else may have occurred when the additional instructions were read we do not know. No outsider has any business in the jury room. Much harm could result, and that is enough to warrant a holding that such prejudicial error—in violation of the defendant's constitutional right—could not have been cured.

The protection of Section 10, Article I of the Ohio Constitution and Sec. 13442-10 Ohio General Code as to the requirement that the accused be personally present in felony cases are but declaratory of the common law and are found generally in all state constitutions.

In *State v. Grisafulli, supra*, it was held:

> "Section 10, Article I of the Ohio Constitution, a part of the Bill of Rights, provides substantially that in any trial for a felony, an accused shall be allowed to appear and defend in person and with counsel. And Section 13442-10, General Code, states in effect that no person indicted for a felony shall be tried if he is not personally present, unless he escape or forfeit his recognizance after the jury is sworn. * * * A question very similar to the one presented by the instant case was before this court in Jones v. State, 26 Ohio St. 208. The per curiam opinion is short and reads:
>
> 'We are unanimously of opinion, that on the trial of a felony it is error to proceed, at any stage of the trial, during the enforced absence of the accused, save

only in the matter of the secret deliberations of the jury, and perhaps in the hearing of motions after verdict and before judgment.

'It was the *right* of the plaintiff in error *to be present at each and every instruction given to the jury as to the law of the case.* This right was denied to him by reason of his imprisonment under the order of the court; and without inquiry as to the correctness of the instructions so given in his absence, *it will be presumed that he was prejudiced thereby.* (Italics ours.)

'Nor was the irregularity cured by the presence of his counsel at the time the additional instruction was given, and his failure to make objections. The right of the accused to be present on the trial of such case cannot be waived by counsel.

'Judgment reversed and new trial granted.'

The holding in Jones v. State, supra, corresponds with the weight of authority. See Shields v. United States, 273 U.S. 583, 47 S. Ct. 478, 71 L. Ed. 787'' (and other cases).

As is well stated in *State v. Grisafulli,* 19 N.E. (2d) 645 at 648:

''This country is still devoted to the ideals of democracy under which the legal rights of every individual must be recognized and protected. Among these rights is the inherent privilege of one accused of the commission of a felony to be present in person at every stage of his actual trial.''

According to *Powell v. Alabama, supra,* the protection of the due process clause includes within the right of

opportunity of being heard whatever is necessary to assure to the accused, regardless of the merits of the case, all the protection essential to the fundamental conception of a fair and just trial.

No construction of any Ohio statute is involved in the case of petitioner. Ohio statutes have never deprived defendants in felony cases of their right to be present at a trial. In fact, both the Ohio Constitution and Statutes require the personal appearance of an accused in a felony case. For that reason the cases of *Hurtado v. California*, 110 U.S. 516; *Maxwell v. Dow*, 176 U.S. 581; and *Holden v. Hardy*, 169 U.S. 366; and *Twining v. N. J.*, 211 U.S. 78, 111, do not apply. In fact it is contended—although not pertinent to this case—that limitations do exist upon legislative powers of the states under the 14th Amendment in dispensing with the personal presence of an accused at a capital trial. See remark of Mr. Justice Moody in *Twining v. New Jersey, supra*, at page 99.

Thus, the law of Ohio upon the right of a defendant to be present in a capital case at the giving of the additional instructions is not open for argument so far as this case is concerned. See *State v. Grizafulli, supra.*

A most fundamental requirement of a fair and just trial at common law and under constitutional and statutory provisions is the necessity of the personal presence of an accused in a capital case at every stage of the trial. And under the decision of *Powell v. Alabama*, 287 U. S. 45 (1932) the protection of the due process clause of the Fourteenth Amendment includes this fundamental right within the right of a fair opportunity of being heard.

Thus, it is submitted that due process of law required the presence of the petitioner at the time the trial Court gave the additional instructions to the jury, and that this privilege could not be waived by his counsel, nor cured by the repetition thereof thereafter in his presence.

The jury returned with its verdict within a very short time after the additional instructions were repeated in petitioner's presence. This latter fact shows the tremendous effect of these instructions on the jury's verdict. The prejudice caused by his original absence was immeasureable and incurable by its subsequent repetition.

CONCLUSION

The foregoing federal questions were especially set up and claimed and brought to the attention of the Court at every stage orally, and particularly in the Briefs filed on behalf of the petitioner in the Court of Appeals and in the Supreme Court of Ohio, and by oral argument in said courts.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that rights under the Constitution of the United States be preserved, and that to such an end a Writ of Certiorari should be granted, and this Court should review the judgment of the Supreme Court of Ohio and finally reverse it.

Respectfully submitted,

CHARLES J. MARGIOTTI,

Attorney for Petitioner.

APPENDIX

STATE OF OHIO

OFFICE OF CLERK OF THE SUPREME COURT

Columbus 15, Ohio

February 26, 1948

Mr. Charles J. Margiotti
Attorney at Law
720 Grant Bldg.
Pittsburgh, Pa. (19)

In re: Case No. 31216

Thomas Viola -vs- State of Ohio

Dear Sir:

Your letter of the 19th inst. was received some days ago and referred to the Court, together with your petition for a certificate of this Court clarifying opinion. Your letter and the petition have been returned to the Clerk's Office and I am directed to advise you that the Court decided not to amend its judgment entry or to sign a certificate as desired by you.

The Chief Justice stated that the Journal Entry correctly states the views of the Court to the effect that no debatable constitutional question was involved and that this includes both the state and the federal constitution and amendments thereto.

Letter dated Feb. 26, 1948

The Chief Justice also stated that your briefs presented in this Court will show what constitutional questions were raised by you.

Yours very truly,
(s) Seba H. Miller
Clerk

shm/is

MOTION TO DISPENSE WITH PRINTING OF THE RECORD ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

To The Honorable Fred M. Vinson, Chief Justice, And To The Associate Justices Of The Supreme Court Of The United States:

Comes now the petitioner, Thomas Viola, by his attorney, Charles J. Margiotti, and respectfully moves your Honorable Court to permit the petitioner to proceed with his petition for writ of certiorari seeking a review of the Judgment of the Court Below, the Supreme Court of the State of Ohio, without being required to print the record in the said cause.

In support of said Motion your petitioner avers:

1. Judgment was entered on November 19, 1947 in the Supreme Court of the State of Ohio and constitutes a final judgment of the highest court of that State. On February 16, 1948, this Court granted petitioner an extension until to and including March 18, 1948 within which to present a petition for writ of Certiorari in this case. The petition for writ of certiorari must be filed not later than March 18, 1948.

2. The record was not printed in either the Court of Appeals for the 7th Judicial District of Ohio or in the Supreme Court of said State for the reason that the procedural statutes of that State permitted the parties to proceed on the typewritten transcript and original exhibits.

3. That the testimony of this case amounted to approximately 1500 pages. In addition there were approximately 50 Exhibits in the case.

4. That your petitioner, since the date of his conviction, May, 1946, has been imprisoned at the Ohio State Penitentiary at Columbus, Ohio, and had been a prisoner at the Trumbull County Ohio jail between September 1945 and March 1946. That he is without funds to print the record, and particularly the transcript of the testimony in this case.

5. Accordingly, in order that the consideration of the petition for writ of certiorari, to be herewith filed, may be had during the present term of your Honorable Court, the petitioner files this Motion, seeking leave to proceed on the typewritten transcript and original Exhibits.

Wherefore, the premises having been duly considered, it is respectfully prayed that leave be granted the petitioner to file a petition for writ of certiorari on the typewritten transcript and original Exhibits as embodied in the original record certified to this Honorable Court by the Clerk of the Supreme Court of the State of Ohio.

Respectfully submitted,

CHARLES J. MARGIOTTI,
720 Grant Building,
Pittsburgh, Pennsylvania.